

INTERNATIONAL BANKING: EFFECTS OF NATIONALIZATIONS AND EXCHANGE CONTROLS

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Recent litigation respecting foreign state nationalization of bank deposits and moratoria on bank liabilities has centered around the act of state doctrine and the “situs” of bank obligations. The author reports on a number of recent cases, explores the application of those doctrines and raises questions about the documentation of the deposit and loan transactions.

1. Introduction

The rights and obligations of international banks have been seriously drawn into question by recent interventions by foreign governments [1]. First, as to obligations, is the matter of the home office's liability for deposits made in a foreign branch. A foreign government may take over (nationalize) a depositor's account. The takeover may be more pervasive – the branch as a whole may be nationalized. The intervention may purport to be less permanent than a takeover – the foreign government may impose exchange controls on the branch, restricting immediate repayment of the deposit.

Second, as to rights, is the question of banks' ability to require payment of loans due from a foreign borrower [2]. What is the legal effect, on the banks' right to repayment, of exchange restrictions imposed by the foreign state?

These questions arise in very different business contexts. The home office liability problem involves the institution of branch banking, an institution that is not implicated in the question of the banks' rights to be repaid in the face of debt moratoria imposed by foreign states. For lawyers, however, the problems are interconnected because of the involvement of legal concepts and doctrines that apply in both contexts: rules of contract law, principles of the conflict of laws [3] and the so called act of state doctrine [4]. Unfortunately, these legal

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concepts and doctrines lack scientific precision, have been incompletely developed and are understood in differing ways by different lawyers, and no better understood by lay people, bankers and judges. The purpose of this paper is to describe the factual contexts in which foreign government interventions have arisen and analyze the law's response to those cataclysmic events. This analysis is confined to the responses offered by the laws in force in the United States (U.S.).

2. Home Office Liability for Deposits in Branches

2.1. *A Model of Home Office Liability*

Let me describe what I think are the legal positions that a bank might be expected to take on the question of home office liability for branch deposits. I do not purport to restate the position of all U.S. banks, but rather a model of a bank's view gleaned from a reading of court opinions [5], briefs and law journals [6] and from conversations with bank lawyers.

- (a) The bank that operates from a home office in the U.S. with branches in foreign countries is a single legal entity. As a single entity, it is obligated to repay deposits that are made at any of its branches, but not always.
- (b) The bank bears the commercial risk of a deposit in a branch. If the branch is unable to pay because of its failure as a business, the bank as a whole (the home office) will repay.
- (c) The bank does not bear the sovereign risk of a deposit in a branch. If the depositor's account is nationalized by the foreign state in which the branch is located, if the branch is nationalized, or if the foreign state imposes a restriction on repayment (exchange control) the bank as a whole is not obligated to repay. That is, the sovereign risk, as contrasted with the commercial risk, must be borne by the depositor.

In the bank's view, the legal reasons for the imposition of sovereign risk on the depositor involve some, or all, of the following propositions: first, when a deposit is made in a foreign branch, a contract is created between the bank and the depositor [7]; second, that contract is governed by the law of the state where the branch is located [8]; third, if the law of that state allows the state to take over the account, nationalize the bank or impose a restriction on repayment, the depositor must look to whatever remedy, if any, the law of the state provides; fourth, the law of the state where the branch is located – *not* the law of the state of the home office – governs the contract because the terms of the deposit contract provide that the contract is to be performed in the foreign state [9].

Those terms are set by varying factual circumstances, which may include the following: the documents, such as deposit slips, or certificates of deposit,

may provide for payment by the branch and not by the home office. Even if the documents do not expressly exclude home office liability, it may be within the expectation of both parties, and thus within their contract, that home office liability is nevertheless excluded by international banking practice. That is, it is international banking practice to consider a branch as a separate entity (even though not separately incorporated), and since it is a separate entity, home office liability is excluded, a fact depositors understand. In short, home office non-liability is an implied contract term.

There are reasons why depositors understand that home office liability is excluded. First, depositors who are themselves international banks with branches in foreign countries know the customs of the trade. Indeed they benefit from the custom when they receive deposits. Second, rates of interest, at least for U.S. banks, tend to be higher for deposits at foreign branches than for deposits in the U.S. Two reasons are claimed for this difference in interest rates [10]. First, foreign branches are relieved from the interest and reserve requirements of the U.S. Federal Reserve System. They are relieved from those requirements under the regulations of the Federal Reserve only with respect to a deposit that is payable only at an office located outside the United States [11]. Sophisticated depositors, at least, know this and know that this relief is granted because home office *liability* is intended to be excluded when a deposit is “payable only” at the branch. Second, interest rates are higher for branch deposits in part because the depositor impliedly accepts the risk of nationalization or the imposition of exchange controls.

I can find no rationale for implied exclusion of home office liability with respect to the depositor who is not a bank or who is not a sophisticated investor, that is, the depositor who would not know about international banking practices or who would not be sensitive to interest rate differentials or the reasons that might account for them. However, I do not know whether the number of unsophisticated depositors in branch banks is significant enough to warrant special attention to their interests in the development of international banking law.

- (d) If a bank is sued at its home by a depositor in a sovereign risk case, the bank will defend that it has already “paid” the deposit according to the law of the foreign state and that it does not have to pay twice [12]. It will assert that it has either paid the deposit to the foreign state, if the account was nationalized, or that its liability to depositors generally was extinguished when the branch was taken over by the state. The bank will urge the court to follow the normal rules of conflict of laws; it will assert that the law of the state of the branch is the appropriate law, since on the above analysis that is the law that governs the contract [13]. In turn, the depositor could claim that the forum should not give effect to a foreign law so outrageous and repugnant as to deprive the depositor of property without compensation or other remedy. The depositor might

ask the court to refuse to give effect to that law because to do so would violate the public policy of the forum. The bank's response will be that the act of state doctrine *requires* the court to give effect to the foreign law, and that it is not permitted to apply its own conceptions of public policy [14].

- (e) Continuing with the case just discussed, in which the bank is sued in the U.S. by a depositor who seeks home office liability in a sovereign risk case, there is the litigation risk that a court may trip itself up and tend toward holding the home office liable. Statutory defenses are then available, such as Section 138 of the New York Banking Law [15]. This statute provides that a bank with a foreign branch shall be liable for contracts and deposits to be performed and repaid at the branch, to no greater extent than a bank of that foreign country would be liable under its laws [16].
- (f) Finally, if the contract between the depositor and the branch provides that the home office will repay the deposit despite what happens in the foreign state, the bank will admit that the home office is liable [17]. But this is a very large "if". The existence of such a contract is not lightly to be conceded.

In attributing these propositions to a hypothetical bank, I have tried not to over-generalize their acceptability. Some banks may disagree with them. Also, by attributing them to a bank, I have not intended to say that they are not valid in law or that I reject any of them. I have one question – whether as a matter of policy, if not of current law, the home office should always be free of liability when the branch itself is nationalized [18].

2.2. *The Act of State Doctrine* [19]

Because it figures so prominently in the nationalization cases discussed in Section 2.3, an analysis of the act of state doctrine is in order. In the U.S., it is made by the courts [20] and the effect of which is to compel the application of foreign law in certain cases. In one sense it is the functional equivalent of the doctrine of foreign sovereign immunity [21]. Two cases will illustrate this equivalence. If a foreign state expropriates property, it might be sued in a U.S. court by the former owner who claims, for instance, that the taking violated international law because it was not for a public purpose, was discriminatory against aliens, or was not accompanied by compensation. United States courts will not entertain that suit if the foreign state pleads sovereign immunity [22]. The taking will not be examined because the court will not get to the merits. In contrast, posit the case in which the expropriated property was transferred by the foreign state to a private person who is subject to the jurisdiction of U.S. courts. In a suit by the former owner against the new owner, based on a claim that the foreign state violated international law, a defense of foreign

sovereign immunity is simply not available to the private defendant. Only a foreign state is given immunity from the jurisdiction of the courts of the U.S. If the court were able to get to the merits, it would be necessary to subject the act of the foreign state to examination. However, under the act of state doctrine, the court is obliged not to make that examination [23]. The result is dismissal of the plaintiff's claim. The doctrine does the service, in the suit between the private parties, that the rule of foreign sovereign immunity would perform when the state is defending.

That the former owner cannot recover in our courts would not necessarily mean that the owner is without remedy, but the remedy must be sought in the foreign state itself or at the diplomatic level in the U.S. If the former owner is able to persuade the State Department to take up the claim against the foreign state, the Department would seek redress on the owner's behalf through negotiation with the foreign state, leading possibly to settlement, arbitration or, remotely, to a proceeding in the International Court of Justice on the ground that the foreign state has violated international law when it took the property of a U.S. citizen without compensation.

In the well-known case of *Banco Nacional de Cuba v. Sabbatino* [24], the U.S. Supreme Court explained the doctrine as a principle whose "continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs" [25]. The act of state doctrine seems only to reiterate the normal rules of conflict of laws: if a foreign state performs an act in a matter as to which it has jurisdiction, our courts normally recognize that act [26]. However, our courts have not always routinely applied foreign law [27]. In New York, an exception to the normal application of foreign law is recognized where a law is found to offend the public policy of the forum [28]. Typical of such public policy has been the policy of refusing to give effect to a nationalization that does not provide compensation to the owner of expropriated property [29]. The act of state doctrine operates to nullify that exception. Despite the locally recognized public policy, the court's abstention on act of state grounds results in the application of the usual conflicts rule. As narrowly stated by the Supreme Court in *Sabbatino*: "... the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government ..." [30].

I will pass over lightly the developing expressions of dissatisfaction with the act of state doctrine. The story involves the enactment of the Hickenlooper Amendment that changed the result in the *Sabbatino* case [31]; the amendment's narrow interpretation in subsequent litigation [32]; and the recognition of other exceptions to the doctrine by at least some members of the Supreme Court (the "Bernstein exception") [33].

But there is one aspect of the doctrine of particular relevance in bank deposit cases. It need not be called an exception, since the Supreme Court's

statement of the rule contained this limitation: the courts are not to examine the validity of a taking of property *within the foreign state's own territory* [34]. The problem with a bank deposit is that it is not a physical object within a foreign state's territory. In *Republic of Iraq v. First National City Bank* [35], the U.S. Court of Appeals for the Second Circuit read the *Sabbatino* opinion as affirmatively allowing examination of the validity of a foreign state's taking, if the property in question is "within the United States at the time of the attempted confiscation [36]". The court held that a New York bank account owned by the estate of the late King of Iraq was not within Iraq at the time the government of Iraq purported to confiscate it, but was within New York [37]. Therefore the act of state doctrine did not apply and the court could use customary conflict of laws analysis [38]. Under this analysis, the court conceded that Iraq had jurisdiction, based upon the citizenship of King Faisal, to make a declaration about the ownership of his bank deposit, and to shift that ownership to itself [39]. But since Iraq purported to take the King's property without compensation, the U.S. court could decide not to give effect to Iraq's action [40].

Why should the act of state doctrine preclude examination of a taking of property *within* the taking state and allow examination when the property is *outside* the taking state? The reason cannot be that the taking state does not have "jurisdiction" under international law to make legal declarations about ownership of property outside its territory. It has jurisdiction to declare that, as far as its law is concerned, a chattel in New York is no longer owned by one of its citizens, but is owned by itself [41]. If compensation were paid, our courts would most probably not question that legal declaration [42].

Perhaps the explanation for this differential application of the act of state doctrine is simply that the Supreme Court stated the rule narrowly to cover only the facts of *Sabbatino*. Lower courts, not caring for a rule that stands in the way of "doing justice" in the individual case, therefore feel free not to apply it when the property is not within the taking state [43]. Perhaps the explanation is that some bases of jurisdiction, such as property within the state, owned by a citizen, seem to be more reasonable than others, such as property located outside the state but owned by a citizen. When faced with this dilemma in bank deposit cases, when the property cannot be seen to be anywhere, some courts do not analyze this differential application of the doctrine but accept the proposition as given: for the act of state doctrine to apply, the deposit account must be given a location, a *situs* [44]. Once a *situs* is found, one knows how to apply the doctrine. The trouble with reasoning on the basis of *situs*, however, is that once a *situs* is determined, the conclusion has been stated. If *situs* is determined by a court, and thus is determinative of the result without an analysis of the reasons for differential application of the act of state doctrine, the court's opinion arguably lacks substance.

2.3. The Home Office in the Courts – *Perez, Garcia and Vishipco*

A model of the legal positions a bank might take on the question of home office liability is outlined in Section 2.1. I do not think a review of several recent cases posing this question indicates that the propositions I have outlined have been rejected. But the facts in litigated cases are usually not clear and the opinions frequently carry uncertain implications.

Both *Perez v. Chase Manhattan Bank* [45], decided by the New York Court of Appeals and *Garcia v. Chase Manhattan Bank* [46], decided by the U.S. Court of Appeals for the Second Circuit, involve certificates of deposit issued in Cuba by a branch of Chase Manhattan Bank. In both cases the accounts of the depositors were nationalized and the banks paid over the deposits to the Cuban government. Only after these payments were made, the branches as such were nationalized. When the bank was sued in New York for payment of the deposits, opposite results were reached [47]. I do not say inconsistent results, however, since the facts as found by the courts arguably make for the difference in result.

In *Perez*, certificates of deposit were purchased with local currency [48]. No place of payment was specified in the certificates although they stated that payment would be made in “moneda nacional” [49]. After the Castro government came into power, new Cuban law permitted the government to order banks to close certain accounts of former officials of the Batista government and to turn the proceeds over to the government [50]. The New York court held that Chase’s debt was satisfied by payment to the Cuban government [51]. The jury had found that the debt was repayable in dollars and that the certificates could have been presented at any Chase bank anywhere in the world, including New York and Cuba [52].

The fact that payment was possible in places other than Cuba led to disagreement among the New York courts over application of the act of state doctrine as the *Perez* case moved up from trial to final appellate ruling. The trial court dealt with the problem as one of situs of the debt [53]. The situs was in Cuba and therefore the act of state doctrine required the Cuban taking to stand [54]: “[i]n order for this debt to be beyond Cuban jurisdiction in this case, it would have been necessary for the jury to have found that the place of presentment was *only* outside of Cuba” [55]. The next highest court disagreed: the act of state doctrine applies only “where the obligation is found to be situated *exclusively* within the foreign State” [56]. The highest appeal court disagreed with that ruling: “... a debt is located within a foreign State when that State has the power to enforce or collect it” [57]. This required giving effect to the Cuban decree, even though, as the court said, the debt had “multiple situs” [58].

I think the Court of Appeals in *Perez* reached the right result for convincing reasons which do not require playing games with the abstract concept of

situs. There was certainly a reasonable basis, in conflict of laws terms, for Cuba's exercise of power over Chase to require Chase to pay the debt. Chase was there; the deposit had been made there; the depositors were Cubans; the account was opened in Cuban money [59]. The question is whether, given those facts, a U.S. court should be permitted to apply its own notions of public policy to overried Cuban laws. The underpinnings of the act of state doctrine are that U.S. courts should not intrude on the functions of the executive branch in conducting foreign relations and with maintaining relations with the foreign state. Too aggressive judicial intrusion into matters touching foreign relations is to be avoided. It is too aggressive when the foreign state has power to change legal relations *effectively* within its borders – the state can effectively act with respect to things within its borders and bank accounts within its borders. A court is intruding in foreign affairs when it characterizes such an effective act as unlawful. In that case, the act of state doctrine should be applied and the payment by the bank given effect to extinguish the debt under the applicable law.

Despite this analysis, it is intriguing that, arguably, the same result would be reached even if the act of state doctrine were not applied. The argument might proceed along these lines. When the depositor sues to compel payment in the U.S., the bank counters by stating that Cuban law governs the deposit under ordinary conflicts principles. The depositor argues that when a taking is without compensation the court should not apply the ordinary conflicts rule but should look to the public policy of the forum, under which an uncompensated taking is repugnant; therefore the court should not give effect to the Cuban law. The bank's response might reasonably be that, if the public policy of the forum is applied in that way, and the Cuban taking is not given effect, an equally repugnant result will occur: the bank will be obliged to pay twice. For the court to make the bank pay twice is just as bad as not letting the depositor recover once. Therefore, as between the depositor and the bank, public policy analysis results in a draw. Thus, since public policy analysis leads nowhere, the ordinary conflicts rule should apply.

While *Perez* was decided on an analysis of the act of state doctrine, the *Garcia* [60] case interpreted the circumstances under which the deposits were made in such a way as to make that doctrine irrelevant, without repudiating its applicability. The court gave full credit to Cuba's taking within Cuba, but found Chase liable to pay the debt a second time because, in effect, it had made an additional contract with the depositors [61]. Chase was found to be an insurer against the depositor's claim nationalized by Cuba [62]. In *Garcia*, Chase again issued certificates of deposit against local currency [63]. Under the same Cuban law that was applied in *Perez*, Chase was directed to freeze the depositors' account and turn over its value to the Castro government [64]. Chase did so. When the surviving depositor sued Chase in the U.S. federal court, the trial court's judgment for the depositor was affirmed by the Court of

Appeals [65]. Although conceding that the certificates were payable at any of Chase's branches world-wide, the bank argued that its payment to Cuba cancelled the debt and that the act of state doctrine precluded examination of the Cuban government's action in demanding and receiving payment [66].

Why was there a different result than in *Perez*? The court's likening of the act of the Cuban government to armed robbery was hardly responsive to the legal issue presented in the case [67]. On the legal issues, the court conceded that if the situs of Chase's debt were in Cuba, Cuba could validly seize it and the act of state doctrine would prevent examination of that seizure [68]. I take that to mean the court would have been precluded from inquiring into whether Cuba was acting as an armed robber. But the court found more to the case than the question of the situs of Cuba's debt. The court found that the bank had agreed that, even if Cuba seized the deposits, it would still pay the depositors [69]; the bank had "accepted the risk that it would be liable elsewhere for obligations incurred by its branch" [70].

The evidence, according to the court was:

Dominguez and Garcia became concerned for the safety of their money in 1958 in light of the ongoing Cuban revolution. At the recommendation of a friend, they visited Chase's Vedado branch on March 10, 1958 and spoke to two bank officers. Dominguez expressed his fears over the safety of his money and stated that he wanted to make a fixed term deposit of 100,000 pesos. The Chase officials responded that he was doing the right thing "because it was an insurance, security for the money". They explained that the deposit was a "private contract" between the bank and Dominguez and Garcia. They stated that Chase's main office in New York would guarantee the certificate and that they could be repaid by presenting the certificate at any Chase branch world-wide. The officials said that repayment could be made in dollars in New York since "that is the money that the bank used" [71].

The court rested its holding for the depositors on "Chase's contractual undertaking to ensure the safety of [the depositors'] money by agreeing to honor its obligations in dollars at any of its branches" [72]. There was disagreement with the dissenting judge on the jury's findings, as to whether the bank officers really did promise that the home office would insure the depositors against seizure of their accounts by the Cuban government [73]. I think the lesson is not one that concerns the act of state doctrine, or even how to solve the riddle of the situs of debts, but rather one of loose talk by bank officials and sloppy documentation of the deposit.

When one thinks of the nature of the contract that the bank was found to have made, it is most remarkable. The branch was still open; its assets were there; the bank was there. It would be possible as a matter of *fact* for Cuba to single out depositors and demand their deposits from the bank. The bank would have no defense whatsoever under Cuban law. Nevertheless, the bank officers guaranteed that if that happened, the bank would pay twice. Would they have promised that, if the depositors collected their money and Cuba

expropriated that money the next day, the bank would pay the depositors again? The branch officers were able to get the deposits made. Was that considered a payment for the remarkable insurance policy? Two things are possible. The officers never issued such an insurance policy, or the officers did not realize what they were doing. In the latter case, the message to higher officials in the bank is clear enough. One wonders what internal precautions, in terms of employee training and loan documentation, home offices are taking in light of this unusual case.

Perez and *Garcia* involved the taking of individual depositors' accounts. Only after those events occurred were the branches nationalized; the subsequent nationalizations were irrelevant to the issues presented in those two cases. In *Vishipco Line v. Chase Manhattan Bank* [74], a more difficult problem is encountered – what are the home office liabilities if the branch as such is seized?

In *Vishipco*, the plaintiffs were Vietnamese corporations and a Vietnamese citizen that had deposited funds in the Saigon branch of Chase Manhattan Bank [75]. Chase closed its Saigon branch when it appeared to Chase's officials in New York that Saigon would be taken over by the communists [76]. A week later, the new government issued a communiqué which specified that "banks ... will be confiscated and ... managed by the revolutionary administration" [77]. The French embassy, to whom the local Chase officials had delivered the branch's financial records, turned those records over to the new government [78]. Suit was brought against Chase in New York for the bank's failure to repay the deposits [79]. Chase's defenses included: (1) the seizure of the branch relieved Chase of liability for the deposits under the doctrines of impossibility [80] and *force majeure* [81]; (2) the obligations of the Saigon branch with respect to the individual claims had been assumed by the new government and the act of state doctrine should be applied to prevent challenge to such an act of the government [82]; and (3) Section 138 of the New York Banking Law [83] limited bank liability for overseas branch deposits [84].

With respect to the defense of impossibility, the court observed that: "[b]y operating in Saigon through a branch rather than through a separate corporate entity, Chase accepted the risk that it would be liable elsewhere for obligations incurred by its branch" [85]. The court's position was that a unitary corporation is liable for obligations incurred by any of its divisions. The court asserted that a different result *might* (not *would*) have been reached if the Saigon branch had been a locally incorporated subsidiary or "if the deposit contract had included an explicit waiver on the part of the depositor of any right to proceed against the home office" [86].

We have seen earlier that, in defining its contract obligations, a bank may seek to draw a distinction between the commercial risk of a branch's failure and the sovereign risk of government interference with a bank [87]. No such

distinction was made by the court nor did it make a specific inquiry into the expectations of these particular depositors. The court concluded that Chase had accepted the risk it would have to pay at the home office because “U.S. banks, by operating abroad through branches rather than through subsidiaries, reassure foreign depositors that their deposits will be safer with them than they would be in a locally incorporated bank” [88]. The court asserted that South Vietnamese policy permitting foreign banks to operate only through branches was intended to give depositors more protection than if they had made their deposits in locally incorporated subsidiaries [89].

Let me emphasize that these are statements about depositors’ understandings in general, neither amplified in the court’s opinion nor made with reference to the particular facts surrounding the plaintiffs’ transactions with the branch. That is, the court did not detail conversations with bank officers such as those that took place in *Garcia*. The interest rates on these deposits and differentials with interest rates in locally incorporated branches or in other markets were not explored – Chase’s obligation to pay elsewhere than in Saigon was largely assumed.

With respect to the application of the act of state doctrine, the court’s response was that the government’s decree did not purport to seize the deposits and, in any event, the deposits no longer had their situs in Vietnam when Chase closed its doors [90]. The court noted that on the closing of a branch, “the situs of the debt represented by the deposit would spring back and cling to the home office” [91]. Since Chase was no longer in Vietnam, the government could not sue the bank there to enforce the debt and no longer had jurisdiction over the debt. Thus, even if the government had purported to seize the deposits, it would not have been acting with respect to property within its territory and the act of state doctrine would not apply [92].

I have difficulty accepting that proposition. Although the idea of debt springing back to New York and clinging to the home office is colorful, it is another abstract manipulation of the situs concept that contains within itself the conclusion to the question that is being asked – whether the home office is liable for deposits in branches in a sovereign risk case. This criticism may be countered by the argument that *Vishipco* was not a sovereign risk case because the branch was not open when Saigon was overrun and the nationalization decree issued [93]. But the court apparently viewed Chase as having voluntarily closed the branch without giving notice to the depositors or providing for their payment elsewhere. That line of reasoning might lead to the conclusion that, when a branch is nationalized, the home office will be liable if it can anticipate that the nationalization will occur and voluntarily fails to provide for payment of the branch’s depositors before the event. I am not at all sure that the court would be willing to go so far, but the result, at least, would not depend upon the artificiality of the shifting situs of the debt [94].

The *Vishipco* case may be unique because its facts were unique. The branch

had closed its doors; the court concluded that Chase was no longer in Vietnam. That fact led to nonapplication of the act of state doctrine [95]. But what does the case portend for nationalizations that take the legal form of state succession to a branch that is still operating? If the government formally assumes the branch's deposit obligations and is prepared to honor them, I assume there will be little occasion for litigation. If the nationalization formally takes the depositors' claims as well as the bank's assets, the analysis of the depositors' claims should proceed on the same basis as discussed in connection with *Perez* [96].

A different problem is presented, however, if the nationalization process formally repudiates liability on the deposit claims, if the nationalized bank determines not to pay them, or if the depositor prefers to be paid in dollars at the home office rather than in local currency at the nationalized bank. Analytically the case differs from the nationalization of depositors' claims as such. The nationalization is aimed at the bank. The policy question is who should bear the risk of that nationalization? It seems to me that an analysis of the contract is unavoidable to answer that question. In the *Vishipco* case, the courts' analysis was based on general statements about what depositors expect when making deposits in an overseas branch. At the outset of this article, I indicated various ways in which the depositors' expectations could be explored: the understandings of knowledgeable and sophisticated depositors about international banking practices and the language of deposit documents. I further indicated that the expectations of unsophisticated depositors simply cannot be supplied by generalizations. The risks in litigation are too great for the banks to leave deposit contracts so unclear. There are risks that courts will find implied terms, will generalize about expectations and will manipulate the concept of *situs* to reach results the parties would not have bargained for had they negotiated and clarified the deal. If the terms of the deal are left open, it is tempting to the court that the bank may be the "deeper pocket". If the terms of the contract are left open, there may be no factual basis for deciding which party, by contract, has accepted the risk of nationalization. The court may then reasonably inquire, "Who is the better risk bearer?"

The bank does not want to pay the depositor *twice*, once by losing its assets to the nationalizing state and once by being required to pay at the home office. On the other hand, the depositor does not want *never* to be paid. However, the bank has one remedy that may not be available to the depositor or that may not be effective for depositors of diverse nationalities. It is the ability to seek the aid of the depositor's home state to espouse an international claim for assets. It has been required to give up without compensation, a remedy that is not available to depositors who are citizens of the nationalizing state. I suggest this remedy with considerable diffidence because of the uncertainty of the rules of international law, the absence of forums with power to recognize and enforce claims under international law and the political nature of the negotiat-

ing process between states. Nevertheless, the bank, making its claim through the auspices of a single state, is far more likely to recover the losses from nationalization than are a large number of depositors. The depositor's claims will be smaller than the bank's. If the depositors are of diverse nationalities, their claims may be fragmented. In short, they may fall through the cracks of the administration of international claims. It strikes me that the possibility of such an eventual remedy for the bank under international claims law is an appropriate consideration in the development of a policy for the allocation of risk in nationalization cases.

2.4. Exchange Control Laws: The Wells Fargo Case

Wells Fargo Asia Limited v. Citibank [97], is in litigation in the U.S. District Court for the Southern District of New York. It does not involve a nationalization, nor does it involve a double payment or risk of double payment by the home office. The issue is whether the home office is obligated to immediately repay a deposit which is the subject of a foreign state's exchange control regulations delaying payment by the branch [98].

Wells Fargo Asia Limited (Wells Fargo) is chartered in Singapore and a wholly owned subsidiary of a federally chartered U.S. bank [99]. It claims as follows. Through a money broker, it placed two \$1,000,000 deposits with Citibank's Manila branch [100]. The confirmations for these transactions provide for payment of the deposits in New York [101]. Before maturity of the deposits, the Philippines Central Bank promulgated a regulation requiring Central Bank approval for any remittance of foreign exchange for repayment of principal to foreign banks and financial institutions [102]. Thereafter, Citibank secured approval for payment of a portion of the deposits with funds previously deposited by Citibank/Manila in banks outside the Philippines [103]. Citibank refused to pay the balance, citing the Philippine exchange control regulation as the basis for nonpayment [104]. Wells Fargo sued Citibank for the balance and moved for summary judgment [105]. The district court denied summary judgment because of "factual disputes which may have a material bearing on Citibank's liability" [106].

The parties divide on several questions. One is the interpretation of the documents establishing the deposit. Citibank/Manila's initial telex states:

Please remit U.S. DLR 1,000,000.00 to our account with Citibank New York. At maturity we remit U.S. DLR 1,050,277.78 to your account with Wells Fargo Bank Intl. Corp. N.Y. through Citibank New York [107].

Wells Fargo's confirmation states:

We shall instruct Wells Fargo Bk Intl New York to pay to Citibank, N.A. 399 Park Avenue, New York, N.Y. 10022 U.S.A. Please pay to our A/C with Wells Fargo Bk Intl New York [108].

The broker's confirmation states:

Settlement-Citibank N.A. NYK AC Manila Repayment-Wells-Fargo Bk Intl, NYK
AC Wells Fargo Asia Ltd SGP No. 003-023645 [109].

A statement of Citibank's Terms and Conditions, which the district court states was "apparently" sent to Wells Fargo after the deposits were placed provides:

The bank shall have no responsibility for or liability to the unsigned for ... the unavailability of such funds due to restrictions on convertibility, requisitions, involuntary transfers, distraints of any character ... or other similar causes beyond the bank's control [110].

Wells Fargo claims that a branch deposit is a deposit liability of the bank as a whole, that confirmations by the parties and the broker clarify this by making the deposits payable in New York, that the exchange control regulation in question prevents payment only with Philippine assets and that it does not purport to prevent Citibank from paying with its own assets outside the Philippines [111].

Citibank takes the position that the transaction can be understood only in the light of banking industry practices in connection with Eurodollar deposits [112]. According to Citibank's description of Eurodollar practices, these confirmations do not represent a commitment by the home office to stand behind the deposits in the branch [113], nor do they make the account "payable in New York", implying liability of the home office [114]. As stated by counsel for Citibank in oral argument, they "reflect nothing but the common practice in the industry, which is to reflect places where remittances may be sent" [115].

Citibank further asserts that, according to industry practices, in a sovereign risk case, as opposed to a credit risk case, the depositor knows that the liability is only that of the branch where the account is payable [116]. Citibank claims that Wells Fargo knew this to be the understanding in the banking community [117]. It argued that Wells Fargo made the deposit in the Philippines to get a higher rate of interest (10%) than would have been possible if the deposit had been made with Citibank in New York (8.85%) [118].

Wells Fargo countered by denying that the differential was caused by its assumption of an increased sovereign risk [119]. It asserted that the branch was able to pay a higher rate of interest solely because the U.S. reserve and deposit insurance requirements are not imposed on deposits outside the U.S. [120].

In its denial of summary judgment, the court noted the difference between non-negotiable deposits, such as the one in question, and negotiable certificates of deposit [121], which normally expressly limit the holder to rights under the law of the state where the branch is located [122]. The Wells Fargo deposits were not expressly made subject to Philippine legal restraints [123].

The court found the documentation unclear and thus sent the disputes of the parties to trial on the merits [124]. Central questions to be determined by trial are: (1) what is the understanding of the banking industry with respect to Eurodollar deposit confirmations, (2) what is the understanding of banks with respect to assumption of sovereign risks, and (3) did Wells Fargo have those understandings when it made these deposits [125]? The fact that interest rates for branch deposits were different from the rates for home office deposits may be relevant to determining Wells Fargo's understanding of the terms of the contract. However, the significance of this fact has been expressly reserved for the trier of fact by the district court [126].

If one looks to the future, here again is a case where the terms of the contract have been left to implications and industry practice, with documentation that is not explicit to the layperson, which includes non-banking lawyers and judges. It may be that the actors in this type of transaction are all so sophisticated and knowledgeable that clearer documentation is not needed. Citibank affidavits state this is the case; that may be proved at trial [127]. If, however, understandings are less than universal, the banking community must deal with the resulting problems. Can explicit documentation be developed for a market that depends upon rapidly moving electronic communications? What costs would be imposed upon the industry if it is required to forego reliance on practice in favor of more explicit documentation?

2.5. Section 138 of the New York Banking Law

A court's analysis of a nationalization case might lead it toward home office liability in the following situations: (1) the home office is liable if it promised to pay even though the depositor's account is seized (*Garcia*); (2) the home office is liable if the branch closes and its assets are seized (*Vishipco*); (3) the court concludes that the sovereign risk should fall on the home office in a branch nationalization case, a conclusion I speculate a court might reach where the contract is not clear and the depositor is unsophisticated; and (4) the branch fails (a credit risk case). Section 138 provides that a bank located in New York with a branch office in a foreign country shall be liable for branch deposits to be repaid at the branch to no greater extent than a bank of that country would be liable under that country's law [128].

Until recently, Section 138 was not applied to nationalization cases because the defendant banks have been national banks and the statute was amended only recently to apply expressly to national banks [129]. The open questions are whether the amendment merely clarifies an original legislative intention to apply the statute to national banks, whether the section should be applied retroactively and, as raised in *Wells Fargo*, whether the New York state legislature can constitutionally apply this legislation to national banks [130].

As I read the section, whatever the ultimate decision on its application to national banks, it may have only a limited applicability, depending upon how the court arrives at the possibility of home office liability. The section deals with deposits *to be repaid at the branch office* [131]. In a case such as *Garcia*, where the court *adds* a contract to the basic deposit contract, it is arguable that the New York statute is not applicable according to its terms. Under this line of analysis, Section 138 would not apply in any case where the court finds that the *contract* calls for payment elsewhere than at the branch, no matter what happens in the country of the branch. It similarly might not be applicable in any case in which the court finds that the situs of the deposit has “sprung back” to New York, since the deposit is arguably no longer “to be repaid” at the branch. Under its terms, the section would not relieve the home office of liability for commercial failure of the branch, since the branch would presumably not be relieved of liability, in the country where it is located, by that country’s laws.

This analysis leaves only the following case: where the contract calls for payment *only* at the branch and either the depositors’ accounts are nationalized or the branch is nationalized. Recall that in *Perez*, in which accounts were nationalized, the act of state doctrine was applied and the home office was liable to no greater extent than a bank of Cuba would have been liable under Cuba’s laws, which is what Section 138 calls for [132]. If the same act of state reasoning is applied in a branch nationalization case, a similar result would obtain. Thus, it appears that the New York statute is a local, nonfederal application of the act of state doctrine. As such, in the limited case I have outlined, it does not produce a radical result [133].

3. Sovereign Liability for Bank Loans: Moratoria

Allied Bank International v. Banco Credito Agricola de Cartago [134] puts the question: what, if any, legal effect must a U.S. court give to a foreign government’s decision to delay payment of its bank debt?

Costa Rican banks, owned by the government and subject to the control of its Central Bank, borrowed from a syndicate for which Allied Bank International (Allied) is the agent. Promissory notes and side agreements promised payment of U.S. dollars in New York City [135]. No governing law was specified in the contract; jurisdiction over disputes was provided for in New York and Costa Rica [136]. Although some installment payments were made [137], payments were suspended in the face of an economic crisis. A presidential decree permitted payment of external debt only with approval of the Costa Rican Central Bank [138]. The cited reason was that “... presently the Government of Costa Rica is renegotiating its External Debt and for this purpose there should be harmony of decisions and centralization in the decision-making process” [139]. When informed by the Central Bank that

payment of external debt in U.S. dollars was deferred, Allied sued for payment [140].

The trial court found for the defendants on the basis of the act of state doctrine [141], so that the Costa Rican government's deferral of payment of the debt was not subject to question [142]. Pending appeal, a refinancing agreement was signed by all parties except one American creditor bank, whose interests Allied represented on appeal [143]. The Court of Appeals affirmed [144], but on a different legal basis. Allied had argued that the act of state doctrine did not apply because the situs of the debt was in New York. The court stated that whether the situs was in New York or in Costa Rica was not determinative [145]. If the situs was Costa Rica, Allied's claim should be dismissed on the basis of act of state [146]. Even if the situs was New York and the act of state doctrine would not apply, the claim should still be dismissed [147] because "our courts will give effect to those actions 'only if they are consistent with the policy and law of the United States' " [148]. The Court then found the debt deferral acts of the Costa Rican government to be consistent with the law and policy of the U.S. for several reasons [149]. First, as to law, an 1883 U.S. Supreme Court case [150] had given effect to the Canadian government's reorganization of a government-owned railway [151]. In addition, the U.S. Bankruptcy Act [152] allows for reorganization of corporations [153]. The Costa Rican deferral process was consistent with what U.S. law allows [154]. Second, as to policy, the court noted that the President and the Congress had reacted sympathetically to the Costa Rican government's financial crisis [155]. For example, the U.S. had joined in a recommendation that Costa Rica's commercial debt be rescheduled [156]. Thus, unlike the *Iraq* case, in which the act of a foreign state purporting to deal with property within the U.S. was not given effect because it violated deepseated notions of public policy [157], the court gave effect to the Costa Rican act because it was consistent with this policy [158].

On rehearing, the court vacated its prior decision because it determined that its previous interpretation of United States policy was wrong [159]. The U.S., which entered the case as *amicus curiae* [160], explained that although U.S. policy was indeed to encourage restructuring of foreign debt, Costa Rica's unilateral restructuring was inconsistent with the cooperation and negotiation favored by the U.S. [161]. "The entire strategy is grounded in the understanding that, while parties may agree to renegotiate conditions of payment, the underlying obligations to pay nevertheless remain valid and enforceable" [162].

Because in its earlier opinion the result was to give effect to Costa Rican law whether or not the act of state doctrine applied, the court's revised position on U.S. policy required it to make a determination as to whether the doctrine applied or not [163]. It held that it did not apply, because the situs of the property was in the U.S., not Costa Rica, under two lines of analysis [164].

First, as the Second Circuit reasoned:

[The] concept of the situs of a debt for act of state purposes differs from the ordinary concept. It depends in large part on whether the purported taking can be said to have 'come to complete fruition within the dominion of the [foreign] government'. ... In this case, Costa Rica could not wholly extinguish the Costa Rican banks' obligation to timely pay United States dollars to Allied in New York [165].

This is an odd way to put the matter since the whole point of the case was to ask whether Costa Rica could wholly extinguish the Costa Rican banks' obligation. I take it the court is most likely saying that, as a sheer matter of power, Costa Rica acting within its own territory had no ability to keep a U.S. court from rendering a judgment which could be collected by the creditors from assets outside Costa Rica. Indeed, in an earlier part of the opinion, the court had noted that it would "affront" the foreign government to hold that a taking was a nullity if it is "wholly accomplished" within the foreign state's territory. In terms of power *in fact*, a state can never wholly accomplish the extinction of an obligation of a bank whose person and assets may be at some time in the future subject to another state's jurisdiction.

The court's second line of analysis – the "ordinary situs analysis" – placed the situs in New York [166]. The court balanced the interests of the two countries, a feature of modern conflicts analysis in the U.S., reciting the two countries' connections with the transaction. New York's interest was described in detail: jurisdiction had been conceded in New York, the Costa Rican banks had agreed to pay in dollars, the syndicate agent was in New York, some negotiations had taken place in the U.S., and the U.S. has an interest in maintaining New York as

[O]ne of the foremost financial centers in the world [and in] ensuring that creditors entitled to payment in the United States in United States dollars under contracts subject to the jurisdiction of United States courts may assume that, except under the most extraordinary circumstances, their rights will be determined in accordance with recognized principles of contract law [167].

Costa Rica's interest was described as "essentially limited to the extent to which it can alter the payment terms" of the contracts, the court noting Costa Rica's "legitimate concern in overseeing the debt situation of state-owned banks and in maintaining a stable economy" [168].

Having stated these opposing interests the court did not weigh them in any way that is observable from its opinion other than to conclude rather opaquely that Costa Rica's "potential jurisdiction over the debt is not sufficient to locate the debt there for the purposes of act of state doctrine analysis" [169]. What that potential jurisdiction might be is not described.

The court's analysis of the situs of the debts is less than satisfactory. It reached its conclusion on one line of analysis without articulating clearly that Costa Rica lacked power in fact to alter the outcome and on the other line of

analysis by an ostensible interest balancing which did not weigh the interests. However, the court's explanation of why the act of state doctrine does not apply to acts of foreign states purporting to affect property outside the state [170] is more persuasive than its situs analysis. It reiterated the Supreme Court's rationale for the doctrine as designed to preclude judicial interference in the executive's conduct of foreign relations [171]. It asserted that a court should not inquire into the act of a foreign state "[i]f [the] adjudication would embarrass or hinder the executive in the realm of foreign relations" [172]. It hinted that foreign state acts could be examined if they involved commercial matters [173] and it asserted that if a "taking is wholly accomplished within the foreign state's territory, [that] would be an affront to [the] foreign government" [174]. This permitted the leap to the conclusion that the situs of the property was controlling and its twofold analysis of situs described above [175].

Finally, having disposed of the act of state doctrine, the court returned to the question whether the Costa Rican deferrals were nevertheless to be given effect and concluded they should not [176]. They were not consistent with U.S. law and policy: they were "inconsistent with the orderly resolution of international debt problems" [177]; they were contrary to the interests of the U.S. as a major source of international credit [178]; they were "counter to principles of contract law" [179]. The Costa Rican banks must pay their debt despite their government's moratorium.

4. Conclusion

Doctrines relating to situs of debt and act of state are particularly troubling in cases involving intangibles such as deposits and other bank debt. Those doctrines are litigation tools. Because of their uncertain content and application, litigation may lead to results the parties would not have contemplated had transactions been fully negotiated and their terms clarified. Many of the problems encountered in the litigation discussion in this article could have been avoided if documentation had more explicitly spelled out the expectations of the parties. The uncertainties of the search for those expectations in commercial practices and understandings would have been avoided. I leave my consideration of the cases with a question: is there anything about the banking industry that makes it impossible or impracticable for these understandings to be identified and then expressed clearly?

Notes

[1] Such interventions are illustrated by the circumstances underlying the cases discussed in this paper. See *infra* text accompanying notes 45–47, 75–77 and 97–103.

[2] A foreign borrower may be either a private borrower, a bank owned by a foreign state, or a foreign state itself.

[3] The relevant conflicts rules are those concerning choice of law. *See infra* note 26 and accompanying text.

[4] *See infra* notes 19–25 and accompanying text.

[5] *See, e.g., Garcia v. Chase Manhattan Bank*, 735 F.2d 645 (2d Cir. 1984); *Vishipco Line v. Chase Manhattan Bank*, 660 F.2d 854 (2d Cir. 1981), *cert. denied*, 459 U.S. 976 (1982); *Wells Fargo Asia Ltd. v. Citibank*, No. 84 Civ. 0996 (S.D.N.Y. July 2, 1985); *Perez v. Chase Manhattan Bank*, 61 N.Y.2d 460, 463 N.E.2d 5, 474 N.Y.S.2d 689 (1984).

[6] *See, e.g., Dufey & Giddy, Eurocurrency Deposit Risk*, 8 J. Banking & Fin. 567 (1984); *Heininger, Liability of U.S. Banks for Deposits Placed in Their Foreign Branches*, 11 Law & Pol. Int'l Bus. 903 (1979); *Lowenfeld, In Search of the Intangible: A Comment on Shaffer v. Heitner*, 53 N.Y.U. L. Rev. 102 (1978).

[7] *See Garcia*, 735 F.2d at 646 (bank officials characterized Cuban customer's deposit as a "private contract" with the bank).

[8] *See Perez*, 61 N.Y.2d at 473, 463 N.E.2d at 11, 474 N.Y.S.2d at 695 (application of Cuban law to the bank's obligation where the situs of the debt was Cuba).

[9] *See also Vishipco*, 660 F.2d at 859 (bank contended "that plaintiffs' claims were dismissible for failure to prove that under Vietnamese law they were entitled to recover").

[10] 12 C.F.R. § 204.8(c) (1985). Such deposits include deposits of funds to the credit of foreign branches where the funds are for use outside the U.S. *Id.* § 204.8(a)(2)(ii).

[11] *Id.* § 204.8(c).

[12] *See, e.g., Perez*, 61 N.Y.2d at 470, 463 N.E.2d at 9, 474 N.Y.S.2d at 693.

[13] *See, e.g., Vishipco*, 660 F.2d at 860 (Chase claimed that, under New York choice of law rules, claim concerning Vietnamese branch would be governed by Vietnamese law).

[14] *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 430–31 (1964).

[15] N.Y. Banking Law § 138 (McKinney 1984).

[16] *Id.*

[17] *Garcia*, 735 F.2d at 651.

[18] *See infra* text accompanying notes 45–96.

[19] The classic definition of the act of state doctrine is one of judicial abstention, in which "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory". *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

[20] *See Sabbatino*, 376 U.S. at 398.

[21] Codified in U.S. law by the Foreign Sovereign Immunity Act, 28 U.S.C. §§ 1602–1611 (1982).

[22] *Id.* § 1604.

[23] *See, e.g., Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918); *Underhill*, 168 U.S. at 250. The result is dismissal of the plaintiff's claim. The doctrine does the service, in the suit between the private parties, that the rule of foreign sovereign immunity would perform when the state is defending.

[24] 376 U.S. at 398.

[25] *Id.* at 427–28.

[26] The Restatement (Second) of Conflict of Laws applies a "most significant relationship" test to determine which law should govern the rights and liabilities of the parties. *See* Restatement (Second) of Conflict of Laws §§ 145(1), 188(1) (1971) (directing the reader to § 6). In tort actions, factors relevant to this determination include the place where the injury occurred and the place where the conduct causing the injury occurred. *Id.* § 145(2)(a),(b). In contract actions, relevant factors include the place of contracting, the place of negotiating, the place of performance, and the location of the subject matter of the contract. *Id.* § 188(2)(a),(b),(c),(d). In cases involving the validity of an act of a foreign state, that state's own law may have the most significant relationship

to the transaction at issue. For a critical examination of the Restatement and other current conflicts of laws approaches, see Juenger, *Conflict of Laws: A Critique of Interest Analysis*, 32 Am. J. Comp. L. 1 (1984); Reese, *The Second Restatement of Conflict of Laws Revisited*, 34 Mercer L. Rev. 501 (1982–83).

[27] See, e.g., *Republic of Iraq v. First Nat'l Bank*, 553 F.2d 47, 51 (2d Cir. 1965), *cert. denied*, 392 U.S. 1027 (1966).

[28] See *id.*

[29] *Id.*

[30] 376 U.S. at 428.

[31] 22 U.S.C. § 2370(e)(2) (1982). The Hickenlooper Amendment states that U.S. courts may not, on the ground of the act of state doctrine, decline to decide claims of compensation for taking of property by a foreign state in violation of international law.

[32] *Banco Nacional de Cuba v. First Nat'l Bank*, 431 F.2d 394 (2d Cir. 1970) (Hickenlooper Amendment does not allow U.S. bank to claim foreign state's deposits in compensation for expropriation of bank's property).

[33] Broadly stated, the act of state doctrine will not be applied when, in the particular case, the executive states expressly that it is its policy to relieve the court from any restraint upon the exercise of its jurisdiction to pass upon the validity of the foreign state's acts. *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375 (2d Cir. 1954) (*per curiam*). The plurality in *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972) adopted the Bernstein exception, but six justices rejected it, 406 U.S. at 773 (Douglas, J., concurring); *id.* at 773 (Powell, J., concurring); *id.* at 790–92 (Brennan, J., dissenting, joined by Stewart, Marshall and Blackmun, J.J.).

A commercial activity exception, under which commercial acts of a state will not be subject to the act of state doctrine, was applied by a plurality of the Court in *Alfred Dunhill, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976).

[34] *Underhill*, 168 U.S. at 252.

[35] 353 F.2d 47 (2d Cir. 1965), *cert. denied*, 392 U.S. 1027 (1966).

[36] *Id.* at 51.

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] See Restatement of Foreign Relations Law of the United States (Revised) § 402(2) (Tent. Draft No. 6, 1985).

[43] See, e.g., *Tabacalara Severiano Jorge, S.A. v. Standard Cigar Co.*, 392 F.2d 706 (5th Cir. 1968) (credit owed to Cuban corporation by an American creditor not within Cuban territory).

[44] See, e.g., *Garcia*, 735 F.2d at 645; *Perez*, 61 N.Y.2d at 460, 463 N.E.2d at 5, 474 N.Y.S.2d at 689.

[45] 61 N.Y.2d at 460, 463 N.E.2d at 5, 474 N.Y.S.2d at 689.

[46] 735 F.2d at 645.

[47] See *infra* text accompanying notes 51–52, 61–65.

[48] *Perez*, 61 N.Y.2d at 466, 463 N.E.2d at 6, 474 N.Y.S.2d at 690.

[49] *Id.* at 467, 463 N.E.2d at 6, 474 N.Y.S.2d at 690.

[50] *Id.* at 467, 463 N.E.2d at 7, 474 N.Y.S.2d at 691.

[51] *Id.* at 471, 463 N.E.2d at 9, 474 N.Y.S.2d at 693.

[52] *Id.* at 468, 463 N.E.2d at 7, 474 N.Y.S.2d at 691.

[53] *Manas y Pineiro v. Chase Manhattan Bank*, 106 Misc. 2d 660, 434 N.Y.S.2d 868 (1980).

[54] 106 Misc. 2d at 666, 434 N.Y.S.2d at 872.

[55] *Id.* (emphasis added).

[56] *Perez v. Chase Manhattan Bank*, 93 A.D.2d 402, 409, 463 N.Y.S.2d 764, 768 (1983).

[57] 61 N.Y.2d at 470, 463 N.E.2d at 8, 474 N.Y.S.2d at 692.

[58] *Id.* at 471, 463 N.E.2d at 9, 474 N.Y.S.2d at 693. To complete the confusion caused by defining the problem as one of situs, the dissenting judge in *Perez* argued that a deposit payable at any branch "should not be deemed to have its situs in every country in which the bank may have a branch office, so that the debt may be extinguished by any government which decides to confiscate the account 'located' within its borders". *Id.* at 474-75, 463 N.E.2d at 11, 474 N.Y.S.2d at 695 (Wachtler, J., dissenting).

[59] *Id.* at 466-67, 463 N.E.2d at 6, 474 N.Y.S.2d at 690.

[60] 735 F.2d at 645.

[61] *Id.* at 650.

[62] *Id.*

[63] *Id.* at 646.

[64] *Id.* at 647.

[65] *Id.* at 646.

[66] *Id.* at 649.

[67] *See id.* at 649.

[68] *Id.* at 650.

[69] *Id.*

[70] *Id.*

[71] *Id.* at 646.

[72] *Id.* at 651.

[73] *Id.* at 653 (Kearse, J., dissenting).

[74] 660 F.2d 854 (2d Cir. 1981).

[75] *Id.* at 856. The corporations maintained demand deposit accounts in local currency; the individual's certificate of deposit was denominated in local currency.

[76] *Id.* at 857.

[77] *Id.* (quoting communiqué of new Vietnamese government, May 1, 1975).

[78] *Id.*

[79] *Id.*

[80] *Id.* at 859, 863. For a discussion of the doctrine of impossibility, see *Housing Auth. v. East Tenn. Light & Power Co.*, 183 Va. 64, 71-72, 31 S.E.2d 273, 276 (1944); *see also* 18 S. Williston & W. Jaeger, *Williston on Contracts* § 58 (3d ed. 1978) (unanticipated circumstance makes performance vitally different from that contemplated by the parties); *Restatement (Second) of Contracts* § 26 (1979) (party's duty to perform on contract is discharged where performance made impracticable without his fault).

[81] *Vishipco*, 660 F.2d at 859, 863. For a discussion of *force majeure*, see *A. Corbin, Corbin on Contracts* § 1324 (1962) ("catchword" used to discharge promisor from performance, serving no useful purpose as a test of responsibility).

[82] *Vishipco*, 660 F.2d at 862.

[83] N.Y. Banking Law § 138 (McKinney 1984).

[84] *Vishipco*, 660 F.2d at 865. Because neither party invoked Vietnamese law to define Chase's obligation, the court applied New York law to that question and Vietnamese law (as invoked by the bank) to the question of defenses.

[85] *Id.*

[86] *Id.* at 863-64.

[87] *See supra* notes 5-6 and accompanying text.

[88] *Vishipco*, 660 F.2d at 863.

[89] *Id.*

[90] *Id.* at 862.

[91] *Id.*, quoting Heininger, *supra* note 6, at 975.

[92] *Id.* at 862–63.

[93] *Id.* at 857.

[94] Chase's defense, based on New York's banking law which limits home office liability for deposits in overseas branches, N.Y. Banking Law § 138 (McKinney 1984), was held applicable only to state banks, not national banks such as Chase. *Vishipco*, 660 F.2d at 865. That answer cannot be so easily given today, since New York has recently amended the banking law to apply to national banks. The amendment became effective Aug. 1, 1984.

[95] *See supra* text accompanying note 92.

[96] *See supra* text accompanying note 59.

[97] No. 84 Civ. 0996 (S.D.N.Y. July 2, 1985).

[98] *See id.* at 2–3.

[99] *Id.* at 2.

[100] *Id.*

[101] *Id.* at 8.

[102] MAAB No. 47, Memorandum to Authorized Agent Banks (Oct. 1983) provides:

Any remittance of foreign exchange for repayment of principal on all foreign obligations due to foreign banks and/or financial institutions, irrespective of maturity, shall be submitted to the Central Bank through the Management of External Debt and Investment Accounts Department (MEDIAD) for prior approval.

Accordingly, total obligations to foreign banks/financial institutions as of the end of business hours in New York City on October 14, 1983 shall not be reduced without prior Central Bank approval.

Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment, at 2–3, *Wells Fargo*.

[103] *Wells Fargo*, at 10–11.

[104] *Id.* at 10.

[105] *Id.* at 2–3, 10.

[106] *Id.* at 18.

[107] *Id.* at 8.

[108] *Id.*

[109] *Id.* at 9.

[110] *Id.*

[111] *See id.* at 3, 13.

[112] *Id.* at 12–13. "Eurodollar deposits are time deposits, denominated in U.S. dollars, in a bank or branch located outside ... of the United States." Dufey & Giddy, *supra* note 6, at 567.

[113] *See Wells Fargo*, at 7.

[114] *Id.* at 14.

[115] Transcript of Oral Argument on Motion for Summary Judgment at 22 [hereinafter cited as *Wells Fargo* Oral Argument].

[116] *Wells Fargo*, at 4.

[117] *Id.* at 12–13.

[118] *Id.*

[119] *Id.* at 2–3, 12–13.

[120] *Wells Fargo* Oral Argument, at 51.

[121] *Wells Fargo*, at 5–6, 16.

[122] *Id.* at 6.

[123] *Id.* at 16.

[124] *Id.* at 16–17.

[125] *Id.* at 12–13.

[126] In a footnote to the opinion, the court noted that Wells Fargo had pointed out that interest rates in other foreign cities were the same as those in Manila and thus the Manila rate, arguably, did not reflect an assumed risk of doing business in a risky country. *Id.* at 19 n.2.

[127] *Id.* at 5-7.

[128] N.Y. Banking Law § 138 (1) (McKinney 1984).

[129] *Id.*

[130] Reply Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment at 34, *Wells Fargo*.

[131] N.Y. Banking Law § 138 (McKinney 1984).

[132] *Perez*, 61 N.Y.2d at 460, 463 N.E.2d at 5, 474 N.Y.S.2d at 689; see text accompanying notes 51-58.

[133] It is interesting to speculate on the statute's applicability if the act of state doctrine is overruled or revised by the Supreme Court. The doctrine is a matter of federal law and imposes an obligation on courts to apply foreign law rather than local, non-federal public policy. If the Supreme Court were to jettison the doctrine, for example, the effect would be to allow state courts in the United States to follow their own notions of the conflict of laws. State courts could then freely apply foreign law, following Section 138, or apply their own conceptions of public policy to refuse to apply foreign law. I think that a search for public policy would lead the court inevitably to Section 138 which states a policy that the home office should be liable only to the extent that a foreign bank would be liable.

[134] *Allied Bank Int'l v. Banco Credito Agricola de Cartago*, 757 F.2d 516 (2d Cir. 1985), *rev'g* 566 F. Supp. 1440 (S.D.N.Y. 1983). The Second Circuit's first opinion was published in the advance sheets but later withdrawn and vacated, 733 F.2d 23 (2d Cir. 1984) (available on LEXIS, Genfed library, U.S. App. file).

[135] 757 F.2d at 518-19; see also 566 F. Supp. at 1442.

[136] 566 F. Supp. at 1442.

[137] *Id.*

[138] *Id.*; see also 757 F.2d at 519 (Costa Rican government "issued an executive decree which conditioned all payments of external debt on express approval from Central Bank").

[139] *Allied Bank*, vacated opinion, 733 F.2d at 24-25.

[140] 566 F. Supp. at 1442.

[141] *Id.* at 1443-44.

[142] 757 F.2d at 519; 566 F. Supp. at 1443-44.

[143] 757 F.2d at 519.

[144] *Id.*

[145] *Allied Bank*, vacated opinion, 733 F.2d at 26.

[146] *Id.*

[147] *Id.*

[148] *Id.* (quoting *Republic of Iraq*, 353 F.2d at 51).

[149] *Allied Bank*, 757 F.2d at 519.

[150] *Canada S. Ry. v. Gebhard*, 109 U.S. 527 (1883).

[151] *Id.*

[152] 11 U.S.C. §§ 1101-1174 (1982).

[153] *Id.*

[154] *Allied Bank*, vacated opinion, 733 F.2d at 26.

[155] *Id.* at 26-27.

[156] *Id.* at 25; 757 F.2d at 520.

[157] *Republic of Iraq*, 353 F.2d at 47.

[158] *Allied Bank*, 757 F.2d at 520.

[159] *Id.*

[160] *Id.* at 519.

- [161] *Id.*
- [162] *Id.*
- [163] *Id.* at 520.
- [164] *See id.* at 522.
- [165] *Id.* at 521, *quoting Tabacalera*, 392 F.2d at 715–16.
- [166] *Allied bank*, 757 F.2d at 521–22.
- [167] *Id.*
- [168] *Id.* at 522.
- [169] *Id.*
- [170] *Id.* at 520–21.
- [171] *Id.*
- [172] *Id.* at 521.
- [173] *Id.*
- [174] *Id.*, *quoting Tabacalera*, 392 F.2d at 715.
- [175] *Allied Bank*, 757 F.2d at 521.
- [176] *Id.* at 522.
- [177] *Id.*
- [178] *Id.*
- [179] *Id.*